**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & SICHALE, JJ.A)**

**CIVIL APPLICATION NO. NYERI 16 OF 2016**

**IN THE MATTER OF AN INTENDED APPEAL**

**BETWEEN**

**NAIROBIKIRU LINE SERVICES LIMITED …….. APPLICANT**

**AND**

**SUB-COUNTY OF OTHAYA ……. 1ST RESPONDENT**

**SUB-COUNTY ADMINISTRATOR …….. 2ND RESPONDENT**

**MAWAT NISSAN SACCO …….. 3RD RESPONDENT**

*(An Application for injunction and stay of Ruling and Order of the High Court of Kenya at Nyeri delivered by (Mativo, J) dated 9th March, 2016*

*in*

***CIVIL SUIT NO. 11 OF 2014)***

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**RULING OF THE COURT**

The applicant, **NAIROBIKIRU LINE** filed a Notice of Motion dated 11th April, 2016 predicated under Rule 5 (2) (b) of this Court's Rules. In the main it sought,

> **"(3) THAT pending the hearing and determination of the intended appeal an order be issued restraining all the Respondents, their agents, servants, employees and/or anybody acting on their instructions from harassing, intimidating, threatening and/or impounding any vehicles operating under the Applicant/Appellant's name at Othaya Matatu/Bus Terminus also known as Othaya Bay next to Othaya Sub-County ticketing offices at Othaya Town subsequent to the Ruling issued on 9th March, 2016."**

The Sub-County of Othaya, the Sub-County Administrator and Mawat Nissan Sacco were named as the 1st, 2nd and 3rd respondents respectively.

A brief background to the motion is that the applicant, the then plaintiff filed suit against the respondents by way of plaint and sought an order for injunction against the respondents and their agents from harassing, intimidating, threatening and/or impounding any vehicles belonging to the applicant at the Othaya Matatu/Bus Terminus. Contemporaneously with the filing of the plaint, the applicant filed a Notice of Motion seeking injunctive relief pending the determination of its suit. The motion was heard by Mativo, J who in a ruling dated 9th March, 2016 dismissed the motion. The applicant was dissatisfied with the said outcome, hence the intended appeal.

On 9th November, 2016 the motion came before us for hearing in the presence of Miss Wanjiro Ndirangu and Mr. Wachira learned counsel for the applicant and for the 3rd respondents respectively. There was no appearance for the 1st and 2nd respondents inspite of service of the hearing notice on 19th September, 2016 upon the firm of Muthoga Gaturu on record for them. The two counsel indicated that they wished to rely on their written submissions and the authorities filed.

In its written submissions the applicant faulted the High Court judge for failing to find that the applicant had not established a *prima facie* case with a likelihood of success on the basis that the supporting affidavits were signed by unauthorized persons. It was their position that, that was not the case and that even if it was, this failure was a technical issue. The applicant further faulted the trial judge for finding that the loss, if any, to be suffered by the applicant was quantifiable and the applicant had indeed quantified the loss. It was the applicant's submission that the quantification ***"… is not adequate to protect its right to use the matatu terminus bay."***

In its submissions filed on 7th September, 2016 the 3rd respondent opposed the appeal on the reasoning that there was no positive order capable of enforcement to warrant an order for stay. In support of this argument, the 3rd respondent relied on this Court's decisions in **Moraa Ndege v Moenga Moenga Kisumu Court of Appeal Civil Application No. 116 of 2011 [2012] eKLR.** Secondly, it was the 3rd respondent's submissions that the applicant had failed to demonstrate that it had a *prima facie* case with a likelihood of success and further that it had not shown that it would suffer irreparable injury which would not be adequately compensated for by an award of damages.

We have considered the motion and its supporting affidavit, the 3rd respondent's replying affidavit, the appellant's further supporting affidavit, the written submissions and authorities of the appellant and that of the 3rd respondent as well as the law. Our jurisdiction under Rule 5 (2) (b) of this Court's Rules is well settled. In **Multimedia University & Another v Professor Gitile N. Naituli (2014) eKLR** this Court while considering an application under **Rule 5 (2) (b)** expressed itself as follows:-

> ***"When one prays for orders of stay of execution, as we have found that those are what the applicants are actually praying for, the principles on which this Court acts, in exercise of its discretion in such a matter, is first to decide whether the applicant has presented an arguable appeal and second, whether the intended appeal would be rendered nugatory if the interim orders sought were denied. From the long line of decided cases on Rule 5 (2) (b), the common vein running through them and the jurisprudence underlying those decisions was summarized in the case of Stanley Kangethe Kinyanjui v Tony Ketter & Others [2013] eKLR as follows:***
>
> > ***i. In dealing with Rule 5 (2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge's discretion to this Court.***
> >
> > ***v. The discretion of this Court under Rule 5 (2) (b) to grant a stay or injunction is wide and unfettered provided it is just to do so.***
> >
> > ***vi. The Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75.***
> >
> > ***vii. In considering whether the appeal will be rendered nugatory the Court must bear in***

***mind that each case must depend on its own facts and peculiar circumstances.***

***viii An applicant must satisfy the Court on both the twin principles.***

***ix. On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised.***

***x. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous.***

***xi. In considering an application brought under Rule 5 (2) (b), the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal.***

***xii. The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.***

***xiii. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."***

The issue, therefore, for our determination is whether the applicant has shown that (i) the appeal is arguable and (2) that the appeal, if it succeeds, will be rendered nugatory unless an order for stay is granted. In considering these twin principles, we propose to address the issue whether a negative order is capable of being stayed as raised by the 3rd respondent. As stated above, the appellant sought injunctive relief in the High Court and which relief was not granted. The issue for our determination as to whether a dismissal of a suit is capable of being stayed was considered by this Court in the case of **Western College of Arts & Applied Sciences v Oranga & Others [1976] KLR 63** wherein this Court declined to grant an order for stay on the basis that there was nothing to stay, the suit having been dismissed. In a unanimous decision the court rendered itself as follows:

***"But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. An execution can only be in respect of costs …***

***The High Court has not ordered any of the parties to do anything, or to refrain from doing anything or to pay any sum. There is nothing arising out of the High Court judgment for this Court in any application for stay to enforce or to restrain by injunction."***

A similar finding obtained in the case of **Devani and 4 others v Joseph Ngindari (Civil Application No. Nai 136 of 2004 (unreported)** where an application had been made under rule 5 (2) (b) of the Rules of the Court for an interim stay of execution of a High Court order/decree which had dismissed judicial review proceedings under Order 53 of the Civil Procedure Rules. In its decision the court stated as follows:

***"By dismissing the judicial review application, the superior court did not thereby grant any positive order in favour of the respondents which is capable of execution. If the order sought is granted, it will have the indirect effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done.***

***It can only do so after hearing the appeal. It seems to us that the application for stay of execution of the dismissal order was not brought in error. It was designed to achieve that result which regrettably is impracticable."***

By parity of reasoning, the dismissal of the applicant's motion on 9th March, 2016 was a negative order whose effect cannot be enforced. We too are of the considered view that if we were to grant any such

order as sought, this would be tantamount to reviving the dismissed application and which we cannot do in an application under Rule 5 (2) (b).

We have therefore come to the inevitable conclusion that the High Court having dismissed the motion, there is nothing capable of being stayed. The order for dismissal is not capable of execution or enforcement to warrant a stay as anticipated under Rule 5 (2) (b). The application for stay is unmerited. It is hereby dismissed with costs to the 3rd respondent.

***Dated and delivered at Nyeri this 1st day of March, 2017.***

***P. N. WAKI***

**……**

***JUDGE OF APPEAL***

***R. N. NAMBUYE***

**……..**

***JUDGE OF APPEAL***

***F. SICHALE***

**……..**

***JUDGE OF APPEAL***

*I certify that this is a true copy of the original*

***DEPUTY REGISTRAR***